Supreme Court, U. S.
FILED
JUL 24 1980
MICHAEL RODAK, JR., CLERK

80-111

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.....

ANNA BARR AND ABRAHAM BARR, as Administrators DeBonis non of the goods, chattels and credits of THOMAS NATHANIEL BARR, Deceased,

Petitioner.

v.

THE CITY OF NEW YORK AND NEW YORK HEALTH AND HOSPITAL CORPORATION, JAMAICA HOSPITAL, ALFRED H. SMITH, M.D., NORBERT GERSTEN HARBER, M.D., GEORGE OTEIFA, M.D., AND KIMITRIOS KOTSILUMBUS, M.D.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ~~COURT OF APPEALS FOR THE STATE OF~~ NEW YORK ~~AND APPELLATE DIVISION SECOND DEPARTMENT~~ Sup Ct, Queens Cty

GERALD MURRAY
Counsel for Petitioner

Office & P.O. Address
90-61 Sutphin Boulevard
Jamaica, New York 11435

6/6/79
(p. 3A)

QUESTIONS PRESENTED

Whether under the fifth and fourteenth amendments the plaintiffs were deprived of property without due process of law and a fair trial.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	2
Questions Presented.....	2
Statutes, Federal Rules and Regulations Involved.....	2
Statement.....	2
Reasons For Granting the Writ.....	3
Conclusion.....	5
Appendix.....	6
Consisting of	
Order of Court of Appeals	1A
Order of Hon. Joseph Kunzeman entered on June 27, 1979.....	1A
Memorandum of Hon.,Joseph Kunzeman dated June 6, 1979.....	3A
Order of Joseph J. Kunzeman dated September 13, 1979.....	4A
Affidavit of Gerald Murray supporting motion for leave to appeal to Court of Appeals.....	5A
Affidavit of Anna Barr supporting motion for reconsideration sworn to on July 31, 1979.....	8A

INDEX

Page

Affidavit of Robert R. Hyman M.D. sworn to on July 12, 1979..... 10A

Excerpt of Anna Barr's testimony at Examination Before Trial..... 11A

Death Certificate.....12A
Portions of Brief below..... 13A

CITATIONS

Central Land Co. vs. Laidley 159 U.S. 103 (1894)..... 3

Fuentes vs. Shevir 407 U.S. 67 (1971)..... 3

Mullane vs. Central Hanover Tr. Co. 339 U.S. 306 (1967)..... 4

BrinkerHoff-Faris Trust & Savings Co. vs. Hill 281 U.S. 673 (1929)..... 4

Wheeler vs. Jackson 137 U.S. 245. (1890)..... 4

Fifth Amendment..... 2,3

Fourtheenth Amendment..... 2,3

INDEX

California- Hundley vs. St. Francis Hospital, 161 Cal. App. 2nd 800.....13A

Colorado-Davis vs. Bonebrake 135 Colo. 506.....13A

Louisiana-Thomas vs. Lobrano 76 So. 2nd 599.....13A

Misouri-Thatcher vs. DeTar 351 Mo. 603.....13A

Noth Carolina-Nowell vs. Hamilton 249 N.C. 523.....13A

Pennsylvania-Ayers vs. Morgan 397 Pa. 282.....13A

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Respondents.

The Petitioner prays that a writ of certiorari issue to review the judgment of the New York Court of Appeals entered in the above case on May 29, 1979.

OPINIONS BELOW

The Supreme Court rendered its opinion after motion for summary judgment and are reprinted in the Appendix at pp. 1A through A. There were no opinions rendered by the Court of Appeals and Appellate Division; the affirmance by the Court of Appeals and Appellate Division are unreported.

JURISDICTION

The judgment of the New York Court of Appeals was made and entered on May 29th, 1980, and copies thereof are appended to this petition in the Appendix at p. A. The jurisdiction of this Court is invoked under the fifth and fourteenth amendment.

QUESTIONS PRESENTED

Whether under the fifth and fourteenth amendments the plaintiffs were deprived of property without due process of law.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of the Fifth and Fourteenth Amendments of the United States Constitution.

STATEMENT

This suit is for wrongful death concerning the claims of medical malpractice which occurred at Jamaica Hospital during a period of hospitalization which commenced on April 2nd, 1970 and terminated on the death of the above named THOMAS NATHANIEL BARR on April 13th, 1970. The plaintiffs basically claim because of fraud they were prevented from learning of the death until June of 1974 and thereafter prosecuted this action diligently. The defendants made a motion for summary judgment based on the statutes of limitation which was granted by the Court below. The basic contention of the Plaintiffs is that by the granting of the motion the Plaintiffs was not entitled to a trial on the merits and was deprived of due process under the law under the fifth and fourteenth amendments.

REASONS FOR GRANTING THE WRIT

The decision in the Court below and the affirmance thereof, thereby acquiescing to the opinion below are in conflict with the Constitution, United States Supreme Court cases and equitable principles for a fair trial and a hearing on the merits.

As early as 1895 the United States Supreme Court in the case of Central Land Co., vs. Laidley 159 U.S. 103 held that when the parties have been fully heard in the regular course of judicial proceedings an erroneous decision by a State Court does not deprive the unsuccessful party of his property without due process of law within the fourteenth amendment of the Constitution of the United States.

A fortiori, the plaintiffs in the case at bar did not have a full hearing as contemplated by the fourteenth amendment. The case of Fuentes vs. Shevin 407 U.S. 67 holds that Florida and Pennsylvania pre-judgment replevin provisions work a deprivation of property without due process of law insofar as a deny the right to a prior opportunity to be heard. And on page 82 it is an interesting quotation from that case of the Courts language:

"This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case,"

Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subseqent proceedings (if any), " Boddie v. Connecticut, 401 U.S. 371, 378, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect....."That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, supra, at 378-379 (emphasis in original)."

An interesting quotation appears in Brinkerhoff-Faris Trust and Savings Co., v. Hill 281 U.S. 673 at page 682, "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which a state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it".

In the case of Wheeler v. Jackson 137 U.S. 245 at page 258 an interesting quotation, "A statute of limitation cannot be said to impair the obligation of a contract, or to deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit."

The facts shown by plaintiff appellants affidavits and testimony referred to at 8A-11A are in variance with what his honor states they are in his memorandum at page 3A and 4A.

CONCLUSION

The Courts should very jealously guard the granting of summary judgment without a trial. Especially in case at bar where the judge appoints himself a fact finder without a hearing as guaranteed by the Fifth and Fourteenth Amendments.

It is respectfully urged that this is the affect of the decision in the Courts below in the Barr case.

.....

GERALD MURRAY

APPENDIX

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of May A.D. 1980

PRESENT, HON. LAWRENCE H. COOKE,
Chief Judge, presiding

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2 Mo. No. 414
Anna Barr & ano., as Administrators &c. Thomas Nathaniel Barr, Deceased,
Appellants,
vs.
The City of New York, et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph W. Bellacosa
Clerk of the Court

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Queens at the Courthouse located at 88-11 Sutphin Blvd. in Jamaica, Queens on the 27th day of June, 1980.

P R E S E N T :

HON. JOSEPH J. KUNZEMAN

JUSTICE.

ANNA BARR AND ABRAHAM BARR, AS ADMINISTRATORS DE BONIS non of the goods, chattels and credits of THOMAS NATHANIEL BARR, Deceased,

Plaintiffs

-aganist-

THE CITY OF NEW YORK AND NEW YORK HEALTH & HOSPITALS CORPORATION, JAMAICA HOSPITAL, ALFRED H. SMITH,M.D., NORBERT GERSTEN HABER, M.D., GEORGE OTEIFA, M.D., and DIMITRIOS KOTSILUMBUS, M.D.,

Defendants

---x

A motion by defendant Jamaica Hospital, having regularly come on to be heard in the above-captioned matter for dismissal based upon the statue of limitations, and upon reading and filing the notice of motion dated February 5, 1979, the affirmation of Daniel J. Dillon dated February 6, 1979 in support thereof, the affidavit of Anna Barr duly sworn to on March 15, 1979 in opposition thereto, and the undated brief of Gerald Murray, attorney for the plaintiff, submitted in opposition thereto, and the reply affirmation of John R. O'Connor dated March 26, 1979.and Health & Hospital Corporation having regularly come on to be heard in the above-captioned matter seeking dismissal based on a failure to state a cause of action, and upon reading and filing the notice of cross-motion dated February 28, 1979 and the affirmation of Michael Eric Zuller of same date in support thereof, and there being no opposition thereto,

And due deliberation having been thereon and upon reading and filing the decision of this Court, it is,

ORDERED that the motion by defendant Jamaica Hospital is granted and the complaint

against it is dismissed and it is further

ORDERED, that the cross-motion of the defendants City Health & Hospital Corporation for dismissal for a failure to state a cause of action against it is granted without opposition.

And the Clerk is directed to enter judgment accordingly.

H.J.K.
J.S.C.

SUPREME COURT QUEENS COUNTY
SPECIAL TERM, PART I

ANNA BARR and ABRAHAM BARR, etc., BY KUNZEMAN,J.
vs.
CITY OF NEW YORK, et al. DATED June 6,1979
Index No.3921/76

This is a motion by defendant JAMAICA HOSPITAL to dismiss the wrongful death action against it as barred by the applicable Statute of Limitations (EPT L 5-4.1). Defendant CITY OF NEW YORK cross-moves to dismiss the complaint against it on the ground that it has no connection with defendant JAMAICA HOSPITAL.

Plaintiff's decedent was struck by an automobile and taken to JAMAICA HOSPITAL, where he died on April 13, 1970. The death certificate read: "Fractures of mandible, pelvis, tibia, fibula, humerus. Three days coma post cardiac arrest during mandibular fracture reduction: bronchopneumonia, struck by auto Van Wyck Expressway and Alantic Ave. 4/2/70." Plaintiff ABRAHAM BARR did not inquire about the cause of death at the hospital following the death of decedent, and plaintiff ANNA BARR has no recollection of making inquiry. Plaintiffs first learned of the alleged malpractice in June 1974 when Dr. J. Garsman testified during the action

for damages arising from the automobile accident. Plaintiffs allege they were deceived about the existence of a cause of action for malpractice by false death certificate.

An action for wrongful death must ordinarily be commenced within two years after the decedent's death (EPTL 5-4.1). "It is the rule that a defendant may be estopped to plead the statute of limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (Simcuski v Säeli, 44 NY2d 442, 448-9). The plaintiffs herein do not allege what specific statements defendant made to mislead plaintiffs subsequent to the death of decedent. Indeed, at their examinations before trial, plaintiff Anna Barr could not recall making inquiry at the hospital as to the cause of death, and plaintiff Abraham Barr testified that he did not make inquiry. Plaintiffs did not submit an affidavit from Dr. Garsman that shows that the death certificate was false or that decedent died from malpractice. Under the circumstances, defendant Jamaica Hospital is not estopped from relying on the statute of limitations and the complaint against it is dismissed.

The cross motion of defendant City of New York for dismissal for failure to state a cause of action against it is granted without opposition.

Submit order.

_____
J.S.C.

New York Supreme Court Queens County

PRESENT: HON. JOSEPH J. KUNZEMAN JUSTICE
SPECIAL TERM, PART I

ANNA BARR, et al,
-against-
CITY OF NEW YORK, et al.

Index Number 3931/76
Motion date Aug. 31/79
Motion Cal. Number 48
Trial Cal. Number.....

The following papers numbered 1 to ..... read on this motion by plaintiffs for leave to reargue

Upon the foregoing papers it is ordered that this motion for reconsideration the original decision is adhered to. Dated: September 13, 1979

J.S.C.

COURT OF APPEALS
STATE OF NEW YORK

ANNA BARR and ABRAHAM BARR, as ADMINISTRATORS DE BONIS non of the goods, chattels and credits of THOMAS NATHAMIEL BARR, Deceased,

Plaintiffs-Appellants,

-against-

THE CITY OF NEW YORK and NEW YORK HEALTH & HOSPITAL CORP., JAMAICA HOSPITAL, ALFRED H. SMITH, M.D. NORBERT GERSTEN HARBER, M.D., GEORGE OTEIFA, M.D., and KIMITRIOS KOTSILUMBUS, M.D.

Defendants-Respondents.

AFFIDAVIT and Brief in Support of why New York Court Appeals should hear case.

GERALD MURRAY, being duly sworn, deposes and says:

1. I am counsel for the plantiff in this action and have had personal charge of this action for him throughout.
2. This is for medical malpractice resulting in plaintiff's decedent's death.
3. Order and judgment was entered in this action in the office of the clerk of Queens, County, on Sept. 13, 1979, in favor of the defendant and against the

plaintiff dismissing complaint, which order and judgment was unanimously affirmed by order of the Appellate Division, second Department, entered in the office of the Clerk of the Appellante Division on March 10th, 1980. Judgment of unanimous affirmance was entered upon that order in the office of the Clerk of the County of Queens, on March 14, 1980.

4. An opinion was handed down by Special Term. No opinion was handed down in the Appellate Division on the Appeal.
5. The record on appeal to the Appellate Division, its order or unanimous affirmance, copies of all of which are in the possession of the plaintiff's attorney, are made a part hereof.
6. The grounds upon which such leave is asked are set forth in detail in plaintiff appellant's brief and concisely stated are as follows:

A. That such appeal is required in the interests of substaintial justice.

B. That questions of law are raised herein which are questions of general importance as follows:

Point I: Under CPLR 203 (f) Plaintiff would have two years from date of discovery to commence action.

Point II: Doctrine of Equitable Estoppel clearly prevents Defendants from raising the Statute of Limitations.

Point III: Accrual of Malpractice Action Rule in New York is not majority rule in county is inequitable, stale and harsh.

Point IV: Concealment of injuries tolls Statute of Limitations.

Point V: Malpractice Statute of Limitations does not run and has no application to other employees of hospital other than physician, surgeon or other acting in a profession similar thereto.

C. That some of these questions of law have not been passed upon by this Court. Some of these questions have been ruled in plaintiff's favor in this Court. The malpractice accrual rule is not majority view in country and should be changed.

This case is of particular interest as it poses the important question of the law in New York State as to the duties of parties as balanced by their right to rely on professionals. Not only is the law of medical malpractice involved, but of all professionals. The important query here is can a citizen of New York State safely rely on statements and/or conduct of professionals who lull them into a sense of security into believing that they have performed the particular service properly until the statute of limitations has run or can they act within a reasonable time after disvery.

The case at bar is a particularly striking one. The plaintiff's decedent died from obviously gross malpractice. The plaintiff here and counsel had no reason to suspect this and they, it is respectfully submitted relied upon the conduct statements of defendant's agents and servants, death certificate and as plaintiff had been involved in a most serious auto accident also made obvious inferences due to lack of disclosure of said malpractice. It was not until this case came to trial in June of 1974, brought out of record that the malpractice was discovered, more than four (4) years after plaintiff's decedent's death.

It is respectfully submitted that Points I through IV in reality are different avenues to accomplish the same result and should be ruled upon by this Court as it affects a great number of citizens and involves very substantial property rights, and constitutional safeguards.

For this particular case, it is also claimed that plaintiffs' were not given substantial justice.

It is also respectfully submitted that the Point V as to the negligence of a non-professional which would not even call into play the foregoing has never been commented upon by anyone other than plaintiff's counsel.

WHEREFORE, for reasons which appear in the brief of plaintiff-appellant, it is respectfully requested that leave to appeal to the Court of Appeals be granted, in accordance with the provisions of Sub-division (a) (1) of CPLR 5602 in the interest of substantial justice and questions of law as delieneated hereinbefore.

Sworn to before me
on this 27th day of March, 1980.

Notary
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF QUEENS

Gerald Murray

ANNA BARR and ABRAHAM BARR as ADMINIS TRATORS DE BONIS NON OR THE GOODS, CHATTELS AND CREDITS OF THOMAS NATHANIEL BARR, Deceased,

Plaintiff(s),

-against-

CITY OF NEW YORK, et al,

Defendant(s).

Index No. 3921/76

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK)
) ss:
COUNTY OF QUEENS)

Anna Barr being duly sworn and deposes and says the following:

That I am one of the plaintiffs in this case.

As indicated on page 11 & 12 in the depostion taken by the attorneys for Jamaica

Hospital, copies of which are annexed, I testified on a Saturday or Sunday immediately prior to the decedant's death that someone spoke to me and I was very upset and they told me that his heartstopped on the operating table. That was a doctor that came down from the top floor.

I have now examined the hospital records and report of Dr. Robert R. Hyman, copies of which are annexed hereto and have given the matter a great deal of thought.

I now recall that I was told that they did a heart massage and I was told by this doctor that he died all because of a car accident.

I never knew until I examined the hospital records myself recently that the oxygen tube slipped out of his mouth and which caused his untimely death according to the opinion of Dr. Hyman,

I also referred to the death certificate which is clearly misleading which we also relied upon, which gave me the impression further more that the death was due to the car accident.

My attorney advises me under the multiple theories of law that our case should prevail.

WHEREFORE, respectfully submitted a motion for reconsideration for decision for summary judgment be granted and the motion denied, that is to deny summary judgment.

Sworn before me this
31st day of July

ANNA BARR

Notary

Robert R. Hyman M.D.
993 Park Avenue
New York, New York 10028
Telephone 212 628-2110

Gerald Murray
Attorney At Law
90-61 Sutphin Boulevard
Jamaica, New York

Re: THOMAS BARR

Dear Sir:
As per your request, I have reviewed a photostatic copy of the hospital record regarding the above patient, following injuries sustained in an automobile accident on April 2, 1970.
The patient was noted to have sustained a cardiac arrest in the operating room while undergoing surgery for repair of a fractured mandible. On one of the handwritten hospital sheets, marked number 16, there are listed three boxes in the lower half of the page for preoperative complications, operative complications and postoperative complications. In the preoperative complications, it is written, "will do nasal intubation. "In the operative complications, under April 10, 1970, the record indicates that intubation was uneventful. The tube was put through the nostril At approximately 2:25 P.M., the anesthesiologist apparently noted that the tube had slipped out of the nose. It was replaced and when he listened to the patient's heart, he heard nothing. He began to give cardiac massage, without any response. The patient was ultimately resuscitated, but never regained consciousness. He remained in a coma, and ultimately expired on April 13, 1970.
It is my impression, therefore, with a reasonable degree of assurance, that the patient's cardiac arrest can be directly attributed to the finding of the tube having slipped from the nasal intubation root and that this latter event is an episode which represents a de -

pature from good and accepted standard practice of medical care.
Review of the autopsy report rendered in this case, lists, among the cause of death following his multiple fractures, three days of coma post cardiac arrest during mandibular fracture reduction.

Very truly yours,

Robert R. Hyman, M.D.
F.A.C.S.
Diplomate, American Board of Orthopedic Surgery

NOTARY
FFH;mb

Excerpt of Anna Barr's testimony at Examination Before Trial
On page 55 of the record below Mrs. Barr testified in answer to a question as to whether anybody advised her of the prognosis for THOMAS NATHANIEL BARR'S recovery. "I can't remember. Someone did speak to me because I was very upset and they were telling me that his heart stopped on the operation, on the operating table and that some doctor came down from the top floor, the stairs or stairway or something, and he gave him, you know, whatever you call it, I don't know the medical term for it, and that was all."

DIVISION OF RECORDS
EPARTMENT OF HEALTH
BOROUGH OF QUEENS

DATE FILED APR 17 1970

CERTIFICATE OF DEATH THOMAS BARR 55

Certificate No. 156-70-405373

1. NAME OF DECEASED (Type or Print): THOMAS | R | BARR (First Name | Middle Name | Last Name)

MEDICAL CERTIFICATE OF DEATH (To be filled in by the Physician)

2. PLACE OF DEATH: a. New York City; b. Borough: QUEENS; c. Name of Hospital or Institution. If not in hospital, street address: JAMAICA HOSPITAL

3a. DATE AND HOUR OF DEATH: (Month) APRIL (Day) 13 (Year) 1970; 3b. Hour: 9:50 AM

4. SEX: MALE

5. APPROXIMATE AGE: 37 YRS.

6. I HEREBY CERTIFY that I attended the deceased from ... 14 day of APRIL 19 70 that I last saw ... alive on ... and that death occurred on the date and at the hour stated above and resulted from the causes of death stated below.

520 FIRST AVENUE N. Y. 16, N. Y.

Further certify from the investigation and post mortem examination (with ... autopsy) that in my opinion death occurred on the date and at the hour stated above and resulted from the causes of death stated below.

PART I
a. FRACTURES OF MANDIBLE, PELVIS, TIBIA, FIBULA AND HUMERUS.
b. Due to or as a consequence of THREE DAYS COMA POST CARDIAC ARREST DURING MANDIBULAR
c. Due to or as a consequence of FRACTURE REDUCTION: BRONCHOPNEUMONIA. STRUCK BY AUTO

PART II
Contributory causes not related to Part I: VAN WICK EXPRESSWAY AND ATLANTIC AVE. 4/2/70.

Signature: Millard Hilliard
MILLARD HILLIARD M.D.

M.E. Case No. 1811

Signature (Attending Physician) (Assistant) (Medical Examiner) M.D.

PERSONAL PARTICULARS (To be filled in by Funeral Director)

7. USUAL RESIDENCE: a. State: NEW YORK; b. County: Queens; c. City or Town: JAMAICA; d. Inside city limits (Yes or No): YES; e. Length of residence at place of death in City of New York immediately prior to death: 13 Years; f. Street and house number: 137-02 - 170 ST.

8. SINGLE, MARRIED, WIDOWED or DIVORCED (Write in word): MARRIED

9. NAME OF SURVIVING SPOUSE (If wife, give maiden name): DOLORES WHACK

10. DATE OF BIRTH OF DECEDENT: (Month) Dec. (Day) 31 (Year) 1933

11. AGE at last Birthday: 37 Yrs. If under 1 year: months; If LESS than 1 day: days; hrs. or min.

12a. USUAL OCCUPATION (Kind of work done during most of working life, even if retired): Driver Helper

12b. KIND of BUSINESS or INDUSTRY: Oil Truck

13. SOCIAL SECURITY NO.: 250-40-1662

14. BIRTHPLACE (State or Foreign Country): South CAROLINA

15. IF OF WHAT COUNTRY WAS DECEASED A CITIZEN AT TIME OF DEATH: U.S.A.

16. ANY OTHER NAME(S) BY WHICH DECEDENT WAS KNOWN

17. NAME OF FATHER OF DECEDENT: EASOM R. BARR

18. MAIDEN NAME OF MOTHER OF DECEDENT: WILHEMINA HUGHES

19a. NAME OF INFORMANT: DoLores BARR

b. RELATIONSHIP TO DECEASED: Wife

c. ADDRESS: 128 Stillwater Ave Queens N.Y.

20a. NAME OF CEMETERY OR CREMATORY: Rockville Cemetery

b. LOCATION (City, Town or County and State): LyNBrook L.I. N.Y.

c. DATE of Burial or Cremation: 4-17-70

21. FUNERAL DIRECTOR: GRIFFIN'S Queens Abbey Inc.

b. ADDRESS: 198-30 Hollis Ave Queens

BUREAU OF RECORDS AND STATISTICS — DEPARTMENT OF HEALTH — THE CITY OF NEW YORK

This is to certify that the foregoing is a true copy of a record on my custody.

The following are sections of appellant's brief below:

POINT III

ACCRUAL OF MALPRACTICE ACTION RULE IN NEW YORK IS NOT MAJORITY RULE IN COUNTRY AND IS INEQUITABLE STALE AND HARSH.

The view that the cause of action against a physician for malpractice begins to accrue which has been followed New York of recent, by no means a majority view of the country and it is time for the courts to reverse that position as being unfair, harsh and inequitable. California-Hundley vs. S t. Francis Hospital, 161 Cal. App. 2nd 800, Colorado-Davis vs. Bonebrake, 135 Colo. 506, Louisiana-Thomas vs. Lobrano, 76 So. 2nd 599, Missouri-Thatcher vs. DeTar, 351 Mo. 603, North Carolina-Nowell vs. Hamilton, 249 N.C. 523, Pennsylvania-Ayers vs. Morgan, 397 Pa. 282. We name only a few of the jurisdictions that do not enforce this harsh, old and stale New York inequitable rule.

POINT IV

CONCEALMENT OF INJURIES TOLLS STATUTE OF LIMITATIONS.

A case where a doctor, employee of defendant, railroad did not disclose injuries tolled statue of limitations, Mumpower vs. Southern, 270 FS 318. (FELA suit permitted beyond statue of limitations and motion for summary judgment by defendant denied.